No. 96-1866

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ALIDA STAR GEBSTER & ALIDA JEAN MCCULLOUGH,
Petitioners,

v.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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This brief *amicus curiae* is filed by the National Education Association ("NEA") with the written consent of the parties as provided for in the Rules of the Court.[1]

INTEREST OF *AMICUS CURIAE*

The National Education Association ("NEA") is a nationwide employee organization with approximately 2.3 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

is strongly committed to ending gender discrimination by educational institutions, including sexual harassment, and, to this end, firmly supports the vigorous enforcement of Title IX.

SUMMARY OF ARGUMENT

1. It is settled by *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992) that "Title IX placed on [school districts] the duty not to discriminate on the basis of sex," that "teacher sexual harassment" of a student breaches that duty and that school districts can be held liable in Title IX "teacher sexual harassment" damage suits. But the lower courts are deeply divided as to the governing school district legal liability standard.

2. It is our submission—subject to one caveat—that the soundest approach for determining school district liability in Title IX teacher sexual harassment cases is the approach based on the clear and indisputable principles of the developed doctrine governing the liability of employing entities of various kinds to third parties for torts of the entity's employees applied so as to take account of the underlying anti-discrimination law substantive principles. The agency law "scope of employment" concept is a general one that applies in the same way to each of the various kinds of authority that an employing entity can grant to its employees whose role is to supervise or to exercise authority and control over, others. And, on this concept the law holds the employing entity liable for actions taken by the employee within the area that is delegated, whatever that area may be.

These agency principles have proved sound in their field of direct application and serve to effectuate the anti-discrimination purposes of Title IX.

3. While we advocate the general agency principles approach to school district Title IX liability in this kind of case, we add one caveat.

Title IX's goal is to foster non-discriminatory "education programs and activities," and Title IX damage suits are a means toward realizing that end and not an end in themselves. Indeed, when all is said and done, the most effective means for reaching Title IX's goal are pro-active school district efforts to promote equal treatment of all students and to prevent discrimination. And, there is a legitimate basis for concern that the general agency principles school district liability approach will cut against school district adoption and effectuation of such pro-active sexual harassment programs.

All that being so, recognizing an effective pro-active school district sexual harassment policy grievance procedure and prevention program as an affirmative defense to a Title IX damages claim—with the burden of proof on the school board to make the requisite showing regarding the adoption, implementation and effectiveness of such a program—would have the salutary effect of stimulating districts to adopt and implement such program and, in that way, to take vigorous and effective steps toward bringing about Title IX's goal of non-discriminatory education programs and activities.

ARGUMENT

The legal fault line along which the question presented here arises is this: The complaint in this case alleges sexual harassment by a Lago Vista Independent School District teacher of a School District student "under [a School District] education program or activity receiving Federal financial assistance" in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a), which prohibits such sex discrimination in such programs. And, the complaint names the School District—a "legal person" which is incapable of committing such discriminatory acts, or, indeed, any act, on its own, and which can only act through natural persons—as the defendant liable for this alleged discriminatory wrong and seeks damages from the School District for the wrong.

It is settled by *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) that school districts can be held liable in Title IX "teacher sexual harassment" damage suits. But the lower courts are deeply divided as to the governing school-district-legal-liability standard. That being so we begin by briefly outlining what is settled before turning to the point in controversy.

1. *The Lessons of Franklin.* In *Franklin* the plaintiff student brought suit against a county public school district alleging "continued sexual harassment . . . from . . . a sports coach and teacher employed by the district" and further alleging that "though they became aware of and investigated [this] sexual harassment . . . teachers and administrators took no action to halt it[,] discouraged the plaintiff from pressing charges . . . [and on the teacher's eventual resignation. the] school . . . closed its investigation." 503 U S. at 63-64.

In reversing a lower court decision holding that Title IX does not "authorize an award of damages," the Court addressed the substance of the student's Title IX claim in the following terms:

> Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Sav. Bank, FSB v Vinson*, 477 U.S. 57, 64 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional action it sought by statute to proscribe. [503 U.S. at 75.]

And, as to the school district's defense that Title IX, as a Spending Clause statute, will not support a teacher sexual harassment damages claim, the Court added:

> Moreover, the notion that Spending Clause statutes do not authorize monetary awards for intentional violations is belied by our unanimous holding in [*Consolidated Rail Corporation* v.] *Darrone*, [465 U.S. 624 (1984).] See 465 U.S. at 628. Respondents and the United States characterize the backpay remedy in *Darrone* as equitable relief, but this description is irrelevant to their underlying objection: that application of the traditional [remedy] rule in this case will require state entities to pay monetary awards out of their treasuries for intentional violations of federal statutes.

Since the Title IX rule that when a school district teacher sexually harasses a student because of the student's sex in the course of a school district "education program or activity receiving federal financial assistance," that teacher "discriminate[s] on the basis of sex," is derived from the Title VII of the Civil Rights Act of 1964 "supervisor" sexual harassment rule, the rationale of the latter serves to illuminate *Franklin's* meaning.

As the *Meritor* Court stated, since "a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a

living can be as demeaning and disconcerting as the harshest of racial epithets," sexually abusive behavior directed at one sex can so "alter the conditions of employment" as to create a "discriminatorily abusive work environment," violative of Title VII. 477 U.S. at 66, *quoting Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982). In other words,

> the very fact that discriminatory conduct [is] so severe or pervasive that it create[s] a work environment abusive to employees because of their race, gender, religion or national origin offends Title VII's broad rule of workplace equality. [*Harris v. Forklift Systems*, 510 U.S. 17, 22 (1993).]

Conversely, because Title VII does not outlaw harassing conduct as such, but only "discriminat[ion] against any individual with respect to his . . . conditions of employment, because of such individual's race, color, religion, sex, or national origin," discriminatorily abusive "[c]onduct that is not severe or pervasive enought to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Harris*, 510 U.S. at 21.

Sexual harassment of the kind covered by the *Meritor/Harris* standard, then, is unlawful discrimination because it subjects members of the disfavored group to disadvantages and distractions that the favored group is not subjected to and because the discrimination demeans the discriminatees as employees and as human beings, with the foreseeable result of "detract[ing] from employees' job performance, discourag[ing] employees from remaining on the job, or keep[ing] them from advancing in their careers." *Harris*, 510 U.S. at 22.

The same considerations obtain in the school setting in heightened terms. "A requirement that a [child] run a gauntlet of sexual abuse in return for the privilege of being allowed to" study and obtain an education is as

improperly "demeaning and disconcerting" as such a workplace requirement. And, it is equally certain that such a requirement "alter[s]" the child's "educational program or activity" so as to create a discriminatorily abusive educational environment.

Indeed, parents who relinquish temporary custody of their children to a school expect that the children will learn in an environment free of sexual harassment or abuse. And, students in grades kindergarten through high school do not have the option of simply absenting themselves from an abusive environment.[2]

The damage caused to students by sexual harassment, moreover, "is arguably greater in the classroom than in the workplace" because of its "longer lasting impact on its younger victims." *Mary M. v. North Lawrence Community School Corporation*, 7th Cir. No. 97-1285, 1997 WL 763470, at *7 (7th Cir. Dec. 12, 1997). What is more, "a nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives." *Id.*

And, of at least equal importance, teachers serve as mentors and role models and exert a concomitant influence over their students.[3] Students "look to their teachers for guidance as well as for protection." *Mary M.* 1997 WL 763470, at *7. The student-teacher relationship is thus a relationship of "trust and dependency." *Patricia H. v. Berkeley Unified School Dist.*, 830 F. Supp. 1288, 1292-93 (N.D. Cal. 1993).

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[2] As one court explained, "[T]he fact that students are required to attend certain levels of school places a high duty on public school districts to protect the interests of the children." *Bolon v. Rolla Public Schools*, 917 F. Supp. 1423 (E.D. Mo. 1996).

[3] *Ambach v. Norwick*, 441 U.S. 68, 78-79 (1979) ("a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values.")

For all of these reasons, *Franklin's* recognition that Title IX, like Title VII, makes "discriminatorily abusive environment sexual harassment" unlawful is unassailable.

2. *The Disputed School District Liability Standard.* *Franklin*, as we have seen, states that "Title IX placed on the [defendant school district] the duty not to discriminate on the basis of sex," 503 U.S. at 75. And, under the most basic legal principles, a plaintiff in a Title IX sex discrimination case against a school district must therefore show that it is the district—and not a third person—that breached that duty.

(a) We begin with a commonplace that can not be lost sight of: where a complaint alleges that a natural person acted so as to commit a wrong that injured the plaintiff the determination that the defendant is legally liable is unproblematic. But a "government entity cannot act by itself . . . [its] personification is a legal fiction, and [it] can effect its goals only through [its natural person] agents." *Davis v. City of Sioux City*, 115 F.3d 1365, 1371 (8th Cir. 1997).

Thus, the determination that a school district has breached a legal duty, whether that duty arises under Title IX or from another source, of necessity, requires a determination that a school district official or employee or a group of such individuals committed such a breach coupled with a determination that the breach should be denominated as the school district's breach.

To put this another way, aside from the hypothetical case in which a sole educational-entity-proprietor/teacher, whose school receives federal financial assistance, sexually harasses the school's students, there is no case in which there is such an identity between the individual committing the discriminatory acts alleged in a Title IX complaint and the defendant educational entity/recipient of federal assistance as to make the imputation of the discrimination (and the liability) to the defendant self-evident.

The question, then, cannot be whether a school district/federal financial assistance recipient can ever be held legally responsible in damages for discriminatory actions in violation of Title IX taken by a school district teacher in carrying out his role of educating, supervising and directing students. Given the realities just noted, if there were no such school district legal responsibility the *Franklin* decision would be a dead letter.

(b) As we noted at the outset, and as the Court recognized by granting *certiorari* here, the lower courts are divided on the governing legal standard for determing school district legal liability for teacher sexual harassment violative of Title IX under *Franklin*. It is our submission that the soundest approach is the one based on the clear and indisputable principles of the developed doctrine governing the liability of employing entities of various kinds to third parties for torts of the entity's employees applied so as to take account of the underlying anti-discrimination law substantive principles. And, we develop one caveat to that submission in point 3 of our argument, *infra* pp. 13-20.

Since the nineteenth century the common law doctrine has based entity liability on the concept of delegated authority and recognized that delegated authority cannot be defined so narrowly that the employing entity is insulated from responsibility whenever its employees fail to live up to the entity's official rules of conduct. For that kind of narrow delegated authority concept would absolve entities of responsibility for the costs of injuries that are fully foreseeable risks of running an enterprise, and that should be borne by the entity rather than by the injured person:

> It is probably true that before the nineteenth century the master was not normally responsible for the uncommanded acts of the servant . . . However, with the growth of large enterprises, it became increasingly apparent that it would be unjust to permit an employer to gain from the intelligent cooperation of others without being responsible for the mistakes, the errors of judgment and the frailties of those work-

ing . . . for [its] benefit. [Restatement of the Law of Agency 2d (1958) ("Restatement"), § 219, Comment (a)].

Consequently, the clear understanding of modern agency law is that "An action, although forbidden, or done in a forbidden manner, may be within the scope of employment," and that "An act may be within the scope of employment although consciously criminal or tortious." Restatement §§ 230, 231. Indeed, the very concept of "scope of employment" has little content *other* than as a "bare formula to cover the unordered and unauthorized acts for which it is found to be expedient to charge the master with liability, as well as to exclude other acts for which it is not." Prosser & Keeton, *The Law of Torts*, Fifth Edition, 1984, at 502. The "scope of employment" concept is, moreover, a general one that applies in the same way to each of the various kinds of authority that an employing entity can grant to its employees whose role is to supervise or to exercise authority and control over, others. Thus, traditional agency law holds the employing entity liable for actions taken by the employee within the area that is delegated, whatever that area may be.

These agency principles have proved sound in their field of direct application and serve to effectuate the anti-discrimination purposes of Title IX. And their point and proper application to teacher sexual harassment was succinctly stated in *Kracunas v. Iona College*, 119 F.3d 80, 87-88 (2nd Cir. 1997):

> Pursuant to [agency] principles, an employer will be liable for the torts of its employees if the employee " 'purported to act on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.' " *Karibian* [*v. Columbia University*,] 74 F.3d [773,] 780 [(2nd Cir. 1994)] (quoting Restatement (Second) of Agency §§ 219(1) & 2(d) (1958)) . . . . Here, Palma was most certainly acting as Iona's agent in his role of college professor. That very role furthered Iona's goal of attracting students to the college and placed Palma in a position of authority vis a vis his students. His blatant abuse of that authority, if proven, is sufficient under agency principles to impute liability to Iona. In the employment context, similar conduct by a supervisor undoubtedly would visit liability on the employer. College students should not receive less protection from conduct that is shown to be harassment (as opposed to teaching) than do employees in the workplace.[4]

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[4] In a variant on this approach the Eighth Circuit in *Kinman v. Omaha Public School District*, 94 F.3d 463, 469 (8th Cir. 1996) stated:

> We . . . apply Title VII standards of institutional liability to hostile environment sexual harassment cases involving a teacher's harassment of a student.
>
> The Supreme Court in *Meritor Savings* declined to set out a generally applicable standard of liability for employers under Title VII. 477 U.S. at 72. Instead, the Court suggested that common law agency principles should guide courts in determining employer liability on a case-by-case basis. *Id.* For example, . . . in a hostile environment sexual harassment case, "the usual basis for a finding of agency will often disappear." *Id.* at 71. In such cases, the employer should not be held liable unless the employer itself has engaged in some degree of culpable behavior. . . .
>
> We [therefore] hold that the "knew or should have known" standard is the appropriate standard to apply in a case such as this one involving a teacher's hostile environment harassment of a student.

Kinman, we submit, rests on a misreading of the quoted portion of this Court's *Meritor* opinion. What the relevant portion of the opinion says is:

> The EEOC suggests that when a sexual harassment claim rests exclusively on a "hostile environment" theory, however, the usual basis for a finding of agency will often disappear. . . . As respondent points out, this suggested rule is in some tension with the EEOC Guidelines, which hold an employer liable for the acts of its agents without regard to notice. 29 CFR § 1604.11(c) (1985). [477 U.S. at 71.]

This Court did *not* approve—much less adopt—the EEOC suggestion. And, the better view is that Title VII supervisor discrimina-

(c) The court below, to be sure, has rejected the "agency principles" approach in favor of an approach pursuant to which "a school district is not liable for a teacher's sexual harassment unless it has actual notice of the harassment," with actual school district notice meaning that "a school official who had actual knowledge of the abuse was invested by the school board with the duty to supervise the employee and the power to take action that would end such abuse and failed to do so." *Rosa H. v. San Elizario Independent School Dist.*, 106 F.3d 648 (5th Cir. 1997). This "actual notice" approach has nothing to commend it.

Most particularly it waters down the Title IX duty stated in *Franklin*—not to discriminate on the basis of sex in the form of teacher sexual harassment of students—into a duty of teacher supervisors not to knowingly and passively suffer teacher sexual harassment of students. Doing so runs contrary to this Court's instruction that to give Title IX " 'the scope that its origins dictate, we must accord it a sweep as broad as its language.' " *North Haven Bd of Ed. v. Bell*, 456 U.S. 512, 521 (1982) quoting *United States v. Price*, 383 U.S. 787, 801 (1966).

And, while the court of appeals proceeded on the premise that an intentional wrong by a school district teacher in carrying out his assigned role of supervising and directing students cannot properly be imputed to the district as its intentional wrong but that a district supervisor's knowing inaction in the face of teacher harassment can properly be imputed to the district as an intentional wrong, neither logic nor the long lines of the law support this fine-spun, counter-intuitive distinction.

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torily abusive environment sexual harassment cases are governed by the genera! agency principles approach set out in the text above and not by a "knew or should have known" standard. That Title VII question, of course, is before the Court in *Faragher v. The City of Boca Raton*, No. 97-282.

Finally, the court of appeal's effort to tease its "actual knowledge" standard out of the linguistic differences between Title VII and Title IX does not bear analysis as Judge Rovner has recently demonstrated:

> Unlike Title VII . . ., which focuses on the discriminator, making it unlawful for an employer to engage in certain prohibited practices (*see* 42 U.S.C. § 2000e-2(a)), Title IX is drafted from the perspective of the person discriminated against. That statute names no actor, but using passive verbs, focuses on the setting in which the discrimination occurred. In effect, the statute asks but a single question—whether an individual was subjected to discrimination *under* a covered program or activity. And Title IX then broadly defines a "program or activity" to include *"all of the operations of* . . . a local education agency . . ., system of vocational education, or other school system." 30 U.S.C. § 1687 (emphasis added). . . . And because Title IX as drafted includes no actor at all, it necessarily follows that the statute also would not reference "agents" of that non-existent actor. [*Smith v. Metropolitan School Dist. Perry T.P.*, 128 F.3d 1014, 1047 (7th Cir. 1997) (Rovner, J., dissenting.]

3. *The Matter of Prevention and Deterrence.* Having said this much in favor of the general agency principles approach to school district Title IX liability in this kind of case, we would be derelict if we did not add one caveat.

Title IX's goal is to foster non-discriminatory "education programs and activities," and Title IX damage suits are a means toward realizing that end and not an end in themselves. Indeed, when all is said and done, the most effective means for reaching Title IX's goal are pro-active school district efforts to promote equal treatment of all students and to prevent discrimination. Such efforts require a district to set norms, to monitor teacher implementation of those norms and to correct deviations. And, all that requires school district time and money.

It is in the nature of things, as well, that no such effort will bring absolute and unvarying perfection. Given human imperfection, the numbers of teachers in a school district and the number of discrete settings in which those teachers exercise their authority to supervise and direct students, that is particularly true where the discrimination in question takes the form of teacher sexual harassment.

Thus, there is a legitimate basis for concern that the general agency principles school district liability approach will cut against school district adoption and effectuation of pro-active sexual harassment programs. The logic of that concern is developed in Judge Posner's opinion in *Jansen v. Packaging Corporation of America*, 123 F.3d 490, 511 (7th Cir. 1997), which considered the cognate employer Title VII liability for supervisor sexual harassment issue:

> A law that requires the employer to do more than is feasible to control harassment will impose costs without creating deterrent benefits. . . .
>
> In these circumstances, strict liability would not only be expensive and unnecessary, and possibly regressive as well; it would be futile. If the law imposes liability in harassment cases in which there is no reasonable measure that the employer could have taken to prevent the harassment, the *only* effect of the law will be to impose extra costs on employers and those with whom they are linked contractually. Employers will prefer paying the occasional judgment to incurring costs that, by definition, exceed the employer's foreseeable liability . . .
>
> Sometimes the incremental contribution of strict liability to deterrence is nil or slight, and easily outweighed by the additional costs of a more expansive liability.

Moreover, we recognize that the court of appeal's "actual knowledge" approach to school district Title IX liability can be said to speak to this concern by insulating

a district from liability for teacher sexual harassment that is infeasible to control. But what that leaves unsaid is that the actual knowledge approach does so in passing and at too high a price. For that approach simply insulates school districts from such liability in a large number of instances without regard to whether the district has taken any pro-active steps for prevention and control, much less all feasible steps. And, that is the fatal weakness of the "knew or should have known" school district liability approach as well. Thus, so far as we can see, or has been suggested, there is no "deterrence" argument for adopting either of those approaches in preference to the agency law principles approach outlined above.

But, of course, the standard for imputing legal responsibility for entity employee actions and decision to the entity is not the only means by which the law adjusts the fixing of damages liabilities in the interest of promoting entity action that forwards the purposes of the underlying legal command by maximizing compliance. Another more direct, and more carefully calibrated option is to recognize, as an affirmative defense to a damages claim against the entity, a sufficient showing that the entity had adopted and has implemented an effective prevention and compliance program.

There is, we believe, much to be said for following just that course in the Title IX context. As we have noted, there is the broadest agreement that such programs are the key to the fullest possible realization of Title IX's goal of education programs and activities free of teacher sexual harassment. Similarly, given the nature of this wrong and the nature of the school context there is every reason to believe that after-the-fact Title IX damages suits against school districts are not sufficient on their own to effectuate Title IX's anti-discrimination purposes. And, as Judge Posner points out, there is a rational basis for concern that such damage suits standing alone may cut against the law's deterrent purposes.

All that being so, recognizing an effective pro-active school district sexual harassment policy, grievance procedure and prevention program as an affirmative defense to a Title IX damages claim—with the burden of proof on the school board to make the requisite showing regarding the adoption and implementation of such a program and regarding the program's effectiveness—would have the salutary effect of stimulating districts to adopt and implement such programs and, in that way, to take vigorous and effective steps toward bringing about Title IX's goal of non-discriminatory education programs and activities. And, on that basis, we conclude by outlining what we see as the basic requisites for such a program.

a. *The Sexual Harassment Policy.* The necessary first element is the adoption by the school district and the wide dissemination to all staff, students, and parents, of a policy that "clearly states sexual harassment will not be tolerated and that explains what types of conduct will be considered sexual harassment." U.S. Department of Education, Office for Civil Rights, *Sexual Harassment: It's Not Academic* 8 (1997); *see also* 34 C.F.R. § 106.8(b) (Title IX requires schools to adopt and publish a policy against sex discrimination). The policy must be written in language that can be easily understood by students and should include examples of behavior that constitute sexual harassment. *See* U.S. Department of Education, Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,045 (1997) ("*OCR Guidance*").

b. *The "Prompt and Equitable" Grievance Procedure.* The equally necessary second step is the adoption and wide dissemination to all staff, students, and parents, of a Title IX grievance procedure that provides for the "prompt and equitable" resolution of any allegation of sexual harassment. *OCR Guidance*, 62 Fed. Reg. at 12,044-45; 34 C.F.R. § 106.8(b). It is particularly important that the procedure *encourage* students to report

instances of sexual harassment. *See Meritor*, 477 U.S. at 73 (noting that grievance procedures should be "calculated to encourage victims of harassment to come forward"); *see also Gary v. Long*, 59 F.3d 1391, 1398-99 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569 (1995) (noting that, to dispel a supervisor's apparent authority to harass, the employer must establish that "grievance procedures were clearly 'calculated to encourage victims of harassment to come forward' ") (citation omitted). Moreover, while Title IX requires schools to designate at least one employee to receive complaints (34 C.F.R. § 106.8(a)), a school also must designate alternative persons for receiving complaints to insure that students have "effective" means for reporting harassment. *OCR Guidance*, 62 Fed. Reg. at 12,045. *Cf. Meritor*, 477 U.S. at 73 (faulting failure of employer's grievance procedure to provide employee with alternative route for complaining about sexual harassment).

In its Policy Guidance, OCR has advised schools that, in order to meet the "prompt and equitable" requirement of Title IX, the grievance procedure should include the following elements:

> (1) Notice to students, parents of elementary and secondary students, and employees of the procedure, including where complaints may be filed;
>
> (2) Application of the procedure to complaints alleging harassment carried out by employees, other students, or third parties;
>
> (3) Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
>
> (4) Designated and reasonably prompt timeframes for the major stages of the complaint process;
>
> (5) Notice to the parties of the outcome of the complaint; and
>
> (6) An assurance that the school will take steps to prevent recurrence of any harassment and to correct

others, if appropriate. [*OCR Guidance*, 62 Fed. Reg. at 12,044.]

Title IX also prohibits retaliation for filing a grievance or participating in an investigation, and protection from such retaliation should therefore be guaranteed in the school district policy and grievance procedure. *Id.* An effective Title IX grievance procedure must also include "an opportunity to appeal the findings or remedy or both" and a voluntary and informal means for complaint resolution. *Id.* at 12,044145.

c. *The Prevention Program.* The adoption of sexual harassment policy and grievance procedure, standing alone, is not sufficient, however. What is required is such a policy, such a procedure, *and* a prevention program. "Adoption of strong preventive measures is often the best way to confront the serious problem of sexual harassment." U.S. Department of Education, Office for Civil Rights, *Sexual Harassment: It's Not Academic* 9 (1997); *see also* EEOC Policy Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(f) ("Prevention is the best tool for the elimination of sexual harassment."); Judith B. Brandenburg, *Sexual Harassment: A Challenge to Schools of Education* 19 (1995) ("Sexual harassment policies and procedures will continue to be necessary but not sufficient unless the problem of sexual harassment is addressed proactively through education."); Sharon Howard, *Organizational Resources for Addressing Sexual Harassment*, 69 J. of Counseling & Development 507, 509-10 (1991) (same); Irwin A. Hyman, *et al.*, Policy and Practice in School Discipline: Past, Present and Future 12-13 (Oct. 1994) (paper presented at the "Safe Schools, Safe Students" Conference, on file with NEA) (same).

The essential point, as a recent study at the University of Massachusetts, Amherst revealed, is that:

> [E]ducational efforts effectively increased female undergraduate awareness of the university's sexual harassment policy and grievance procedure and also raised their awareness of the illegality of sexual harassment. More importantly, the evidence suggests that the observed decline in reports of sexual harassment of women students by university faculty and staff represents a real change in the behavior of university employees, and that this change most likely occurred in response to the university's sexual harassment policy and grievance procedure.

Elizabeth A. Williams, *The Impact of a University Policy on the Sexual Harassment of Female Students*, 63 J. of Higher Educ. 50, 60-61 (1992). *See also* Kathleen Beauvais, *Workshops to Combat Sexual Harassment: A Case Study of Changing Attitudes*, 12 Signs: J. of Women in Culture & Society 130, 139-43 (1986).

Thus, the necessary third element of a pro-active program is providing students with frequent, age-appropriate, and flexible training that instructs students both how to recognize sexual harassment and what to do if it occurs. *See OCR Guidance*, 62 Fed. Reg. at 12,044. To this end, sexual harassment awareness—or, more broadly, lessons regarding mutual respect—can and should be incorporated into the curriculum. *See, e.g.*, Nan Stein & Lisa Sjostrom, *Flirting or Hurting? A Teacher's Guide on Student-to-Student Sexual Harassment in Schools* (1994); Nan Stein & Lisa Sjostrom, *Bullyproof: A Teacher's Guide on Teasing and Bullying* (1996). Without such instruction, students, particularly younger students, may not understand what conduct is inappropriate or know how to make use of their school's Title IX grievance procedure. *See OCR Guidance*, 62 Fed. Reg. at 12,040.

By the same token, "the school must make sure that all designated employees have adequate training as to what conduct constitutes sexual harassment and are able to explain how the grievance procedure operates." *See OCR Guidance*, 62 Fed. Reg. at 12,045. All "administrators, teachers, and staff," moreover, should receive training "to ensure that they understand what types of conduct can

cause sexual harassment and that they know how to respond." *See OCR Guidance*, 62 Fed. Reg. at 12,044.

Of equal importance, the school district must institutionalize the sexual harassment policy and the lessons of its training and education instruction by monitoring teacher compliance with the district norms on sexual harassment, by following up on any information suggesting instances of teacher sexual harassment and by taking prompt and effective action to correct any deviation from those norms.

CONCLUSION

For the reasons stated, the decision of Court of Appeals should be reversed and the case remanded to the district court for further proceedings.

Respectfully submitted,

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